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IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

**No. 51067-7-II**

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In re the Marriage of:

Renae A. Grady, fka Cooper,

Appellant,

v.

Andrew Cooper,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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BRIEF OF APPELLANT RENAE A. GRADY

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## **Assignments of Error**

### **A. Assignment of Error**

1. The trial court erred by dismissing the mother's petition to modify the parenting plan based on integration into her household, without reviewing the entire record on revision. RP 3 [lines 19-22].

2. The trial court erred by dismissing the mother's petition to modify the parenting plan based on integration into her household, without considering or evaluating the evidence presented regarding integration into mother's household. CP 297-298; RP 3-5, 7, 12-13, 27-28, 31, 33-37, 45-46.

3. The assigned trial judge in this case is prejudiced against the mother because he has concluded that the sole basis for the petition was the mother's desire to reside in Australia, without regard to the evidence presented regarding integration. CP 297-298; RP 28, 31, 46.

### **B. Issues Pertaining to Assignment of Error**

1. Was it error for the trial court to dismiss the mother's petition to modify the parenting plan on a motion for revision without reviewing the entire record considered by the commissioner below? Assignment of Error 1.

2. Was it error for the trial court to dismiss the mother's petition to modify the parenting plan based on integration into her household, without considering or evaluating the evidence presented regarding integration into mother's household? Assignment of Error 2.

3. Is the trial judge in this case prejudiced against the mother because he has concluded that the sole basis for the petition was the mother's desire to reside in Australia, without regard to the evidence presented regarding integration? Assignment of Error 3.

### **Introduction**

The mother in this parenting plan modification case, Renae Grady, appeals the trial court's order reversing the commissioner's finding of adequate cause, and dismissing the petition for lack of adequate cause. Ms. Grady, being unrepresented by counsel, agreed to a 50/50 parenting plan in 2015 with a 2/2/3 rotating schedule, based upon representations by father that the plan would not be followed and was a mere formality. The parties did not in fact follow the plan after its entry, until the father, Andrew Cooper, suddenly demanded that they start following the 2/2/3 schedule in the summer of 2016.

In late 2016, Mr. Cooper also decided he no longer wanted to maintain a relationship with Ms. Grady's 4-year-old daughter, whom he had always treated as one of his own and included on all visits, family vacations, and holidays. During this same time period, despite demanding that the parties follow the 2/2/3 plan, Mr. Cooper began relinquishing much of his time with the children. The records Ms. Grady kept contemporaneously with the events establish that Mr. Cooper voluntarily relinquished 24% of his time with the children, ages 11 and 8, over the prior twelve months, without ever requesting makeup time. There was no agreement or even indication by Mr. Cooper that

the modified schedule would be followed only temporarily with an eventual return to a 50/50 plan.

Ms. Grady then filed a petition to modify the parenting plan, alleging integration into her home as the basis. In addition, in her motion for temporary orders, Ms. Grady requested that she be allowed to reside with the children in Australia, where her husband and the father of her 4-year-old daughter resides, pending the trial date. The commissioner granted Ms. Grady's request for adequate cause and entered her proposed parenting plan allowing the children to temporarily reside in Australia. Mr. Cooper filed a motion for revision and the trial court granted the same, dismissing Ms. Grady's petition for lack of adequate cause.

The mother appeals because the trial court failed to review the entire record considered by the commissioner on revision, and further failed to consider the actual evidence on integration, instead focusing on the mother's request to move to Australia.

#### **Statement of the Case**

The mother, Renae Grady, and father, Andrew Cooper, in this matter have two children, Isabella and Abraham, ages 11 and 8. CP 63. After the parties separated but before Mr. Cooper filed for legal separation, Ms. Grady became pregnant with the child of another man, Richard Grady, to whom she is now married. CP 63. That child, Hadassah, is now four years old. CP 63.

Mr. Cooper and Ms. Grady entered into an agreed parenting plan on August 18, 2015, providing for a 50/50 joint residential schedule. CP 18-28. The children were scheduled to reside with Mr. Cooper on Mondays and Tuesdays, with Ms. Grady on Wednesdays and Thursdays, and alternating three day weekends. CP 19. Mr. Cooper was represented by an attorney at the time but Ms. Grady was not. CP 26. The understanding between the parties at the time the parenting plan was entered was that Hadassah would also be included as part of Mr. Cooper's family when she was not in Australia, and that the parenting plan was a mere formality never to be followed. CP 64-65, 119, 166.

Despite Mr. Cooper's insistence in June of 2016 that the parties begin following the schedule outlined in the parenting plan, Mr. Cooper started relinquishing much of his time with the children. CP 65. Ms. Grady began keeping a calendar, contemporaneously with the events, documenting that the children resided with Mr. Cooper for only 138 out of 365 days from June 1, 2016 through May 31, 2017, which is a relinquishment of 44 overnights (24% of Mr. Cooper's time). CP 178-179.

During that one-year time period, Mr. Cooper consented to Ms. Grady taking the children on two trips, one to Portugal in June/July 2016 and one to Japan in January 2017. CP 121. The parties arranged prior to the trip to Portugal that Ms. Grady would have the children for approximately one month, then Mr. Cooper would have them for the

following month. CP 167. However, when Ms. Grady and the children returned, he chose to renege on the agreement to have the children for the ensuing month, without explanation. CP 167.

The trip to Japan interfered with one of Mr. Cooper's overnights, as he was scheduled to have the children beginning Monday, January 23, 2017, and they returned from Japan at 9:00 am on Tuesday, January 24, 2017. CP 167, 174. He then voluntarily gave up having the children Tuesday overnight even though they were available to him. CP 167. The agreed upon travel plans interrupted only one of Mr. Cooper's overnights. CP 167.

After seeing the pattern of Mr. Cooper voluntarily relinquishing his time with the children over the prior 12 months, Ms. Grady filed a petition to modify the parenting plan, alleging integration into her household with Mr. Cooper's consent. CP 52-56. Ms. Grady filed a motion for adequate cause determination and for a temporary parenting plan. CP 59-62, 57-58. In her requested temporary parenting plan, Ms. Grady sought the court's approval to reside with the children in Australia pending trial, with all school breaks spent with Mr. Cooper. CP 96-101. Australia was already a second home for the parties' internationally globetrotting children. CP 65-67, 75-76. Ms. Grady proposed that the children attend Stella Maris, ranked 93 out of a score of 100, and Manly Village, ranked 95 out of a score of 100. CP 67, 81-82. In Tacoma, Isabella would attend Jason Lee, ranked 324 out of 441 Washington middle schools (worse than 73.5% of middle schools). CP

66. In addition, two gun-related lockdowns occurred on the campus of Jason Lee just in the month of May 2017. CP 138, 181. Abraham would attend Grant Elementary for one more year, bus to another school for 2 years, and then return to Grant for one last year, only to face the same middle school challenge as Isabella. CP 67.

At the hearing on adequate cause and temporary orders held June 22, 2017, the commissioner found adequate cause and adopted Ms. Grady's proposed parenting plan. CP 146-157, 185, 192-193. Mr. Cooper then filed a motion for revision on June 29, 2017. CP 217-219.

At the hearing on Mr. Cooper's motion for revision, the trial court noted on the record that he did not review all of the records submitted. RP 3. The trial court then dismissed the petition for modification for lack of adequate cause. CP 297-298. Ms. Grady appeals this order. CP 299-302.

### **Argument**

**1. On a motion for revision, the trial court should have considered the entire record before the commissioner below.**

The trial court erred by failing to review the entire record before the commissioner when deciding a motion for revision. RP 3. RCW 2.24.050 provides that "revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." Pierce County Local Rule 7(a)(12) further provides that "[a]t the time a motion for revision is filed, the moving party shall provide the reviewing court copies of all documents submitted by all

parties that were considered by the Court Commissioner in making the decision sought to be revised.”

Here, the trial court admittedly did not review all of the materials submitted by the parties or reviewed by the commissioner. RP 3. Instead, the trial court “read much of the material” and did not “read all of the pleadings that you provided because not all of them really mattered to the issue before the Court.” RP 3. However, the trial court did not specify what material “mattered” to the issue before the court. *Id.* It was error for the trial court not to consider the entire record presented to the commissioner pursuant to RCW 2.24.050 and Pierce County Local Rule 7(a)(12). If the trial court’s decision to dismiss the petition for lack of adequate cause is not reversed on appeal for the reasons stated below, the matter should be remanded for a determination of adequate cause based on the entire record before the court commissioner.

**2. In granting father’s motion for revision and dismissing the petition to modify the parenting plan for lack of adequate cause, the trial court failed to base its decision on the evidence presented regarding integration into mother’s household.**

The trial court’s decision to dismiss the parenting plan for lack of adequate cause should be reversed because the trial court did not base its decision on the evidence submitted regarding the integration into mother’s household. In contrast, the trial court seemed to disregard the evidence of integration altogether and instead focused on Ms. Grady’s desire to reside in Australia, the fact that she had a child with

another man while still legally married to Mr. Cooper, and that the extra time in Ms. Grady's household did not change the fact that it is a 50/50 plan (a fact that was not in dispute).

A trial court's decision regarding modification of a parenting plan under RCW 26.09.260 will be upheld on appeal unless the trial court exercised its discretion in an untenable or manifestly unreasonable way. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239, 1242 (1993). In the present case, the trial court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons, as demonstrated by the trial court's comments during argument of counsel as outlined more fully below.

RCW 26.09.260 provides, in relevant part, as follows:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

RCW 26.09.260. Here, the mother alleged that the children had been integrated into her home with the father's consent pursuant to RCW 26.09.260(2)(b). CP 53-54. Although she did request a temporary parenting plan allowing her to move with the children to Australia pending trial, she did not file a Notice of Intent to Relocate or in any way attempt to argue that the Relocation Act applied to this situation. CP 52-56; CP 96-101. Instead, she filed a petition for modification of the parenting plan consistent with *In re Marriage of Ruff and Worthley*, 198 Wn. App. 419, 393 P.3d 859 (2017). CP 52-56.

RCW 26.09.270 requires the party seeking modification of a parenting plan to submit a motion and affidavit "setting forth facts supporting the requested order or modification," and the court shall deny the motion "unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted." RCW 26.09.270.

A finding of adequate cause must be based on "evidence sufficient to support a finding on each fact that the movant must prove in order to modify." *Link v. Link*, 165 Wn. App. 268, 275, 268 P.3d 963, 967 (2011). The primary purpose for the adequate cause requirement is to prevent the moving party from harassing the non-moving party by obtaining a useless hearing. *Id.*

A finding of “integration with consent” itself fulfills the “substantial change” requirement under RCW 26.09.260(1). *Clark v. Gunter*, 112 Wn. App. 805, 809, 51 P.3d 135, 137 (2002). So, if the mother presented evidence sufficient to support a finding of integration with father’s consent, adequate cause should have been granted and the case set for trial. Furthermore, consent need not be based on the relinquishing parent’s intent, but may also be shown “by the creation of an expectation in the other parent and in the children that a change in physical custody would be permanent.” *Timmons v. Timmons*, 94 Wn. 2d 594, 601, 617 P.2d 1032, 1037 (1980).

Here, the trial court’s comments during oral argument make it clear the trial court was not considering the evidence on integration into mother’s household or the expectation it created, but was instead focused on two issues: 1) whether deviation from the parenting plan changes the fact that it is a 50/50 plan; and 2) mother’s life choices.

First, when Ms. Grady objected to Mr. Cooper’s reference to settlement negotiations, the trial court did not rule on the objection but instead took the opportunity to point out that the “law is pretty clear that the practice, in fact, is not the critical point when determining whether there was a joint parenting plan. It’s what the actual document says.” RP 12. Furthermore, in making its ruling, the trial court stated “I’m going to find under these circumstances there was a joint plan.” RP 46. The mother had never argued that the parenting plan was anything other than a 50/50 designation, and the trial court seems to miss the

point that deviation from the parenting plan goes to the integration argument, not whether the Relocation Act applies.

With regard to mother's life choices, the trial court stated the following:

- “Well, who is the one who changed the game here? Isn't that Ms. Grady? She decides she is going to relocate to Australia. She gets pregnant, which is fine, with her now husband's child during the period of this marriage. This evolution of circumstances is not driven by what the children need. It is driven by what Ms. Grady wants.” RP 28.
- “How is there any plan that is going to work when one parent lives 5,000 miles away from the other and both want equal time with their children?” RP 31.
- “But this is being driven by the fact that she is going to move to the southern hemisphere.” RP 31.
- “The substantial change in the circumstances here are primarily those of Ms. Grady's own making. She wants to be in Australia with her new husband and child and family.” RP 46.
- “However, she also wants to disrupt these children, take them in the middle of a school year to install them in a foreign country... That's not consistency, and the best interest of the child requires consistency.” RP 46.

- This “is still something that is being driven by Mrs. Grady’s choices.” RP 46.

In considering the evidence regarding the extra time in Ms. Grady’s household, the trial court questioned “Wasn’t part of that Mr. Cooper’s willingness to follow Ms. Grady’s requests to take the children to Japan or wherever else she wanted to take them?” RP 33. However, the evidence clearly shows that Mr. Cooper lost only one day with the children due to the trip to Japan in January 2017, and that he voluntarily chose not to exercise the agreed upon makeup time for the trip to Portugal. CP 167. There was no evidence presented or argued regarding other travel that interfered with Mr. Cooper’s time.

The evidence submitted by Mr. Cooper for the twelve-month period from May 1, 2016, through May 31, 2017, showed he had the children 181 days and that they were with their mother 215 days. CP120. However, he did not state when the calendars were prepared (i.e. for litigation or contemporaneous with the events). CP 120. The calendars show the children residing with Mr. Cooper during spring break of 2017, but he later admitted he did not have the children during that time. CP 135-136, 244. Ms. Grady had records, including photos with the children or other correspondence corroborating the dates, that the children were actually with her on 22 of the days claimed by Mr. Cooper. CP 167-168, 176.

When Ms. Grady attempted to argue that Mr. Cooper’s records regarding the children’s schedule lacked credibility, the trial court said

“I’m not here to find facts at this point in time. I’m here to try to decide whether there is an adequate cause to go forward with a major modification.” RP 37. Here, a determination of the time spent in each parents’ household and the reasons for Mr. Cooper’s relinquishment of time are clearly “facts” that must be “decided” to determine whether integration, and therefore adequate cause, exists.

Here, this was not a case where the parties agreed to temporarily deviate from the parenting plan for a period of time with the expectation of returning to 50/50. Instead, Mr. Cooper voluntarily gave up 24% of his time over the preceding 12 month period (44 out of 182 overnights), with no agreement, intention, or expectation that the 50/50 schedule would resume. CP 178-179.

For these reasons, the trial court exercised its discretion in an untenable or manifestly unreasonable way in dismissing the petition for lack of adequate cause. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239, 1242 (1993).

**3. The comments made by the trial court during oral argument indicate that it is biased against Ms. Grady and will not be able to fairly and impartially decide issues before it in this case.**

The trial court judge’s comments outlined above indicate that, if this case is remanded, he will not be able to fairly and impartially rule in this case. A case can be transferred to another judge if it is shown that the assigned judge is prejudiced against a party. RCW 4.12.040(1). A judge is prejudiced against a party if he or she has a preconceived


adverse opinion, without sufficient grounds or cause, with regard to a person's case. *Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961). In the present case, the trial court's repeated comments regarding Ms. Grady getting pregnant during the marriage, desiring to move to the "southern hemisphere" and instill the children in a "foreign country," that the circumstances are being "driven by what Ms. Grady wants" and not "what the children need", and that the circumstances are of her "own making", demonstrate that the primary concern was Ms. Grady's life choices, not whether the children had been integrated into her home. RP 28, 31, 46. If this court agrees that the trial court erred in dismissing the case for lack of adequate cause, she requests that the case be remanded to a different trial court judge so that she may obtain a fair and impartial trial.

#### **V. Conclusion**

Ms. Grady respectfully requests that the order dismissing her petition for modification of the parenting plan be reversed, her petition be reinstated, and the case be remanded to a different trial court judge for further proceedings.

Respectfully submitted this 1<sup>st</sup> day of December, 2017.

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### **Certificate of Service**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 1<sup>st</sup> day of December, 2017, she electronically filed the attached Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same were electronically delivered to each of the following parties and their counsel of record:

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**December 01, 2017 - 9:15 AM**

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